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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
PETITIONERS,

v.

ATTORNEY GENERAL OF TEXAS and
JUDGE F. HAROLD ENTZ, *et al.*,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUDGE ENTZ'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly construed the Voting Rights Act to require proof that the candidate preferred by minority voters was defeated on account of race?

2. Whether the Court of Appeals properly considered the powerful interest of the State of Texas in the establishment and operation of a fair and effective judicial system in determining whether the Voting Rights Act was violated?

3. Whether the Court of Appeals properly refused to permit some of the parties, by their agreement, to prevent consideration of the merits of the appeals independently perfected by Judge Entz and Judge Wood?

4. Whether the 1982 amendments to the Voting Rights Act are unconstitutional if not construed as the Court of Appeals did?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iii

Statutes Involved 1

Statement Under Rule 29.4(b) 3

Statement of the Case..... 3

Reasons for Denying the Writ 7

I. The Issues Now Ripe for Review Do Not Merit This Court's Attention 7

II. The Fifth Circuit Properly Construed Section 2 to Avoid Difficult Constitutional Issues that this Court May Be Required to Address if Certiorari Is Granted and a Different Construction of Section 2 Applied 10

III. The Fifth Circuit's Refusal to Remand and Thereby Dismiss Judge Entz's Independently Perfected Appeal Was Correct and Would Not In Any Event Merit the Exercise of this Court's Supervisory Powers 11

Conclusion..... 12

TABLE OF AUTHORITIES

CASES

Crowell v. Benson,
285 U.S. 22 (1932) 11

Houston Lawyers' Association v. Attorney General of Texas,
115 L. Ed. 2d 379 (1991) 8

McCray v. New York,
461 U.S. 961 (1983)..... 8

Nipper v. Smith,
1 F.2d 1171 (11th Cir. 1993)
(reh. pending as of Nov. 23, 1993)..... 8-9

Rodgers v. Lodge,
458 U.S. 613 (1982)..... 4

Shaw v. Reno,
113 S. Ct. 2816 (1993)..... 11

Thornburg v. Gingles,
478 U.S. 30 (1986) 4,9

White v. Regester,
412 U.S. 772 (1973)..... 3

STATUTES AND REGULATIONS

28 U.S.C. § 2403(a)..... 3

S. REP. NO. 97-417 *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177 3

U.S. CONST.
amend. V 2
amend. VI 2
amend. X 2
amend. XIV, §§ 1,5 2-3
amend. XV, §§ 1,2 3
art. IV, § 2 2
art. IV, § 4 2

Voting Rights Act, 42 U.S.C. § 1973 3,10

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Respondent Dallas County District Judge F. Harold Entz ("Judge Entz") opposes Petitioners' Petition for a Writ of Certiorari, for the following reasons:

STATUTES INVOLVED

In addition to the statutes cited by Petitioners, this case involves several constitutional provisions, as follows:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. U.S. CONST. art. IV, § 2.

The United States shall guarantee to every State in this Union a Republican Form of Government . . . . U.S. CONST. art. IV, § 4.

No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . . U.S. CONST. amend. V.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. U.S. CONST. amend. VI.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. CONST. amend. X.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

. . . .

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. U.S. CONST. amend. XIV, §§ 1, 5.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV, §§ 1, 2.

STATEMENT UNDER RULE 29.4(b)

Because the proceeding draws into question the constitutionality of the 1982 amendments to Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

The Court of Appeals below has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question, by letter dated February 20, 1990.

STATEMENT OF THE CASE

A Voting Rights Act claim requires "a searching practical evaluation of the 'past and present reality.'" S.

Rep. No. 97-417, at 30 (quoting *White v. Regester*, 412 U.S. 772, 769, 770 (1973)), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 208, and "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (quoting *Rodgers v. Lodge*, 458 U.S. 613 (1982)). Petitioners' Statement of the Case deficiently ignores the reality of partisan politics, which has permeated every aspect of this case ranging from the underlying elections to the attempts of two of Texas' elected Attorneys General (both Democrats) to surrender to Petitioners' demands through collusive "settlement" efforts. Judge Entz agrees generally with the statement of the case in the Fifth Circuit's en banc majority opinion below and will touch briefly on the facts in this Opposition only to illustrate some of the partisan political aspects of the case omitted by Petitioners.

Texas district judges are elected in partisan elections. App. 3a. From Reconstruction until about 1978, this meant essentially all Texas district judges were Democrats. In recent years that has changed. Beginning in 1978 in Dallas County, for example, virtually only Republicans have been elected as district judge. *E.g.*, App. 89a. This partisan sea change has happened to greater and lesser degrees in most of the urban counties in the state. *See generally* App. 86a-120a.

The partisan shift is color blind. Again using Dallas County as an example, a black, female, Republican challenger defeated a white, male, Democrat incumbent. App. 89a-90a. In every instance save one, when a minority

candidate ran for district judge, the Republican candidate won regardless of race. App. 89a. The only exception is the most recent election (after trial) when a black Democrat beat a white Republican. The color blindness of the electorate also holds true within both parties; minority candidates of both parties fare as well as or better than white candidates of their respective parties. App. 91a, 94a. The practical reality of Dallas County judicial races is that partisan affiliation determines election outcomes and race is irrelevant. App. 88a, 93a.

The emergence of the Republican party as a viable second party in Texas has manifested itself, such as in this suit; Governor Clements, his appointed Secretary of State Bayoud, and Chief Justice Phillips of the Texas Supreme Court, all Republicans and defendants, were by statute represented by Attorney General Mattox, a Democrat. *E.g.*, App. 4a-5a & n.4. In view of the partisan nature of the claims in this case and the partisan affiliation of the state's lawyer, Judge Entz intervened in his various individual capacities: a sitting judge whose election was under attack, a lawyer and participant in the judicial system, and a registered voter in Dallas County. App. 20a. Judge Wood from Harris County similarly intervened. *Id.* As the Fifth Circuit acknowledged, Judge Entz and Judge Wood "played an important role at trial and have since taken the lead." App. 19a.

Following the adverse ruling on liability in the trial court, Attorney General Mattox attempted to side with Petitioners and proposed a remedial plan acquiescing in Petitioners' demands to end countywide elections, over the

objections of Judge Entz and Judge Wood. When the district court adopted an interim plan that differed slightly from the Attorney General's and Petitioners' only in eliminating the partisan nature of elections, it was Judge Entz and Judge Wood who perfected the first appeal from that order and sought a stay. App. 5a. It was only later that the Attorney General, dissatisfied with the nonpartisan aspect of the interim plan, appealed and sought a stay. *Id.*

The Attorney General's lukewarm defense of this case continued with his successor, Attorney General Morales (a Democrat). Following decisions for defendants from the Fifth Circuit and the Fifth Circuit en banc, counsel for the Attorney General stood before this Court and argued that the Fifth Circuit was wrong, and counsel for Judge Entz and Judge Wood were unable to argue in favor of the ruling below. On remand and following an adverse panel decision that was quickly vacated when the case was set for rehearing en banc, the Attorney General once again attempted to accede to Petitioners' demands and thereby snatch defeat from the jaws of victory. App. 7a.

Efforts to resolve this case through the political process had previously failed; changing Texas' system of electing judges would require a constitutional amendment, and no amendment acceptable to Petitioners could muster the requisite 2/3 vote. App. 7a. Thus, in the purported settlement, Petitioners, the Attorney General, and other statewide elected officials (all Democrats) sought to enlist the power of the federal courts to permit them to sidestep the to-them awkward requirements of the Texas Constitution and simply impose their constitutional

amendment on the state by judicial fiat effectuating their collusive agreement. *Id.*

In an effort to obtain political legitimacy for their purported settlement, the Attorney General and Petitioners agreed that it would be effective only upon approval by both houses of the Texas Legislature. App. 7a-8a. For reasons likely not of interest to this Court, one third of the Texas Senate can block a vote on any subject. Thus, for the same reasons no constitutional amendment on this subject can be enacted, the Texas Senate never approved the purported settlement. App. 8a. This procedural obstacle did not slow down those intent on amending the Texas Constitution by a collusion-tainted judicial decree — they accepted an endorsement by a majority of the state senators sitting as a committee in a vote that divided precisely along party lines. *Id.*

Judge Entz relies upon the opinion of the en banc majority of the Fifth Circuit for the balance of the factual background.

REASONS FOR DENYING THE WRIT

I. THE ISSUES NOW RIPE FOR REVIEW DO NOT MERIT THIS COURT'S ATTENTION

Partisan politics is not an evil of itself. A partisan political brawl becomes destructive when it masquerades in the guise of civil rights litigation. Petitioners would have this Court rewrite Clausewitz to provide that Voting Rights Act litigation is a continuation of partisan politics by other means.

The subject matter of this case — the structure of the judiciary of one of our sovereign states — is certainly significant. That fact alone, however, does not mean that the decision below, in the context of the developing jurisprudence under the Voting Rights Act, merits review by this Court at this time. This Court's opinion in *Houston Lawyers' Association v. Attorney General of Texas*, 115 L. Ed. 2d 379 (1991) ("*HLA*"), raised a new and significant question regarding how a state's vital and affirmative interest in the structure of one of its branches of government would be considered in determining whether section 2 of the Voting Rights Act is violated. The Fifth Circuit is the only circuit to date to consider that question after *HLA*; although Petitioners do not acknowledge it, even the dissenting judges below who reached the merits agreed that the weight of the state's interest is a legal question that can be considered de novo by an appellate court. App. at 173a-180a, 280a & n.30. The opinion below also addressed the issue of whether the race of the candidate matters in determining the presence or absence of racially polarized voting. Again, the Fifth Circuit is the only circuit to date to consider that question after *HLA*. This Court has determined in similar instances that it would wait to address issues until other lower courts had considered them. *E.g.*, *McCray v. New York*, 461 U.S. 961 (1983).

The purported conflicts between the Fifth Circuit's ruling and the Eleventh Circuit's later ruling in *Nipper v. Smith*, 1 F.3d 1171 (11th Cir. 1993) (reh. pending as of Nov. 23, 1993), also do not merit review. The issue of whether the degree of minority success should be compared

to the pool of qualified candidates or to the populace as a whole is barely present in a footnote in *Nipper*. *Id.* at 1181 n.13. The issue is likewise not central to the Fifth Circuit opinion and likely would not affect the outcome were it resolved differently. Similarly, the question of whether to consider elections with white versus Hispanic, rather than black, candidates was peripheral to the Fifth Circuit's opinion and, in view of the holding regarding the affirmative state interest, would not affect the outcome were it resolved differently, *see* App. 95a n.37; furthermore, that reasoning is not actually in conflict with *Nipper*, which addressed white versus white elections. Review of those issues, if ever merited, would better occur in a case in which they are central and outcome determinative.[1]

Finally, Petitioners claim that certiorari is justified because the Fifth Circuit did not follow this Court's rulings in *HLA* and *Thornburg v. Gingles*, and did not follow this Court's mandate in *HLA*. That claim is nothing more than an argument that the dissents below were correct and the majority was wrong. If the majority was correct, then it correctly understood and followed this Court's rulings and mandate, and certiorari is not needed. Judge Entz believes

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[1]Moreover, the purported conflict between the Eleventh and Fifth Circuits may soon disappear. *Nipper* was decided September 15, 1993; the Fifth Circuit's ruling below was on August 23, 1993. *Nipper* does not cite the Fifth Circuit's decision and presumably was drafted before the Fifth Circuit's ruling was released. As of November 23, 1993, a motion for rehearing was still pending in *Nipper*.

the Fifth Circuit's ruling can stand on its own merits without further argument from him at this point.

II. The Fifth Circuit Properly Construed Section 2 to Avoid Difficult Constitutional Issues that this Court May Be Required to Address If Certiorari Is Granted and a Different Construction of Section 2 Applied

As noted by the Fifth Circuit below, Judge Entz has carefully preserved serious constitutional challenges to section 2, including the constitutionality vel non of the 1982 amendments, which were not addressed due to the construction given section 2 below. App. 28a n.28. Those issues include:

- Whether application of section 2(b) to destroy the structure of Texas' judiciary violates fundamental principles of state sovereignty, federalism, and separation of powers?

- Whether the 1982 amendments to section 2 were a valid exercise of Congress' enforcement powers under the Fourteenth or Fifteenth Amendments?

- Whether section 2 is unconstitutionally vague if it grants essentially unreviewable discretion to the district courts to set aside decisions of the representative branches of government?

- Whether the construction of section 2 advocated by Petitioners and the dissenters below unconstitutionally dispenses with any causation element

and transforms section 2 into an affirmative action plan mandating particular election results?

It was certainly appropriate for the Fifth Circuit to adopt a reasonable construction of section 2 that avoided addressing these difficult constitutional questions. *E.g.*, *Crowell v. Benson*, 285 U.S. 22, 62 (1932). If certiorari is granted, this Court may also be required to consider those issues.

III. THE FIFTH CIRCUIT'S REFUSAL TO REMAND AND THEREBY DISMISS JUDGE ENTZ'S INDEPENDENTLY PERFECTED APPEAL WAS CORRECT AND WOULD NOT IN ANY EVENT MERIT THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS

Petitioners complain that the Fifth Circuit improperly reached the merits of Judge Entz's and Judge Wood's appeal because the State Defendants were ready to surrender. They bolster that argument by mischaracterizing Judge Entz's intervention as being solely to protect his job. As the Fifth Circuit noted, Judge Entz intervened not only as a sitting judge, but also as a lawyer and voter. App. 20a. Judge Entz's standing as a voter has been strengthened by this Court's recent decision in *Shaw v. Reno*, 113 S. Ct. 2816, (1993). The Fifth Circuit's opinion otherwise sufficiently addresses the reasons the Petitioners and the State Defendants cannot by *their* agreement dispose of *Judge Entz's* appeal.

Even were Petitioners correct on this point, Judge Entz respectfully suggests that disposition of this issue standing alone does not merit the Court's review. It surely will be a rare circumstance that a governmental defendant will prefer

to surrender rather than win; it will be rarer still that other persons have intervened as defendants and desire to continue the fight. This Court need not exercise its supervisory powers over the lower federal courts to address such a rare circumstance.

CONCLUSION

Judge Entz respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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